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IN THE

Supreme Court of the United States

October Term, 1959
No. 613

THE DEUTSCH COMPANY,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LEON M. COOPER,
742 South Hill Street,
Los Angeles 14, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Introduction 1

Reasons for granting rehearing and issuing the writ 3

1. The Supreme Court should grant the petition for rehearing and should issue the writ of certiorari because recent decisions of the United States Supreme Court, of the United States Courts of Appeal and of the National Labor Relations Board are intervening circumstances of substantial and controlling effect which establish the necessity of the Supreme Court's deciding the important questions of law whether the National Labor Relations Board's procedures fail to afford due process of law to parties before it in unfair labor practice hearings 3

   A. The National Labor Relations Board should hear and consider the whole record before deciding that an unfair labor practice has been committed 3

   B. The National Labor Relations Board deprived petitioner and its employees of due process of law by refusing to consider whether its procedural errors caused confusion in an election in which only a minority of the employees voted and thus caused a substantial defect in the election machinery to select a collective bargaining representative 6

   C. Since the National Labor Relations Board must determine whether or not the unit for purposes of collective bargaining is appropriate before it can decide that an unfair labor practice of refusing to bargain has been committed, the Board deprived the petitioner of due process in finding an unfair labor practice for refusing to bargain in an inappropriate unit 7

PAGE

D. The failure of the Board to take evidence as to the proper organization qualifying as the representative for the purposes of collective bargaining is a failure to receive proper testimony on one of the relevant elements on the charge of unfair labor practice for refusal to bargain..... 8

2. Where the statute requires that the representative for purposes of collective bargaining be selected by a majority of the employees and where admittedly the election conducted by the Board did not result in a selection of the representative by a majority of the employees, the purported representative was not legally selected thereby and is not a representative for purposes of collective bargaining with which the employer is required to bargain 9

3. The legal issues posed by the deprivation of due process practiced by the National Labor Relations Board upon the petitioner here has national significance as evidenced by the increasing number of cases in the Courts of Appeal and the United States Supreme Court in which similar issues were raised and by the concern of the Bar with the failure of the National Labor Relations Board to adopt and employ fair rules and procedures..... 11

Conclusion 12

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Connecticut Light & Power Co. v. Leedom, 174 Fed. Supp. 171	4
Kennecott Copper Corp., 125 N. L. R. B. No. 12	7
Morgan Drive Away Inc. v. Teamsters, No. 413, 45 L. R. R. M. 2131	9
National Labor Relations Board v. Dan River Mills, Inc., ... F. 2d ....., 45 L. R. R. M. 2539	8, 11
National Labor Relations Board v. Denna Artware, Inc., No. 46, 28 Law Week 4135	5
National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO, No. 15, 28 Law Week 4111	5, 10
Telecomputing Corp., 125 N. L. R. B. No. 3	7
United Insurance Co. v. National Labor Relations Board, 272 F. 2d 446	4, 11
Wagner Electric Corp., 125 N. L. R. B. No. 106	7

STATUTES

Administrative Procedure Act, Sec. 7(c)	5
Labor-Management Relations Act, Sec. 8(a)(5)	9
Labor-Management Relations Act, Sec. 10(c)	5
National Labor Relations Act, Sec. 9	9
National Labor Relations Act, Sec. 9(a)	2
United States Code, Title 5, Sec. 1006(c)	5
United States Code, Title 29, Sec. 159	9
United States Code, Title 29, Sec. 159(a)	2
United States Code, Title 29, Sec. 160(c)	5
United States Code, Title 45, Sec. 151 et seq.	9

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THE DEUTSCH COMPANY,

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vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Deutsch Company, Petitioner, respectfully petitions this Honorable Supreme Court to grant a rehearing of its Order of February 23, 1960, denying the Petition for Writ of Certiorari, submitting that the Petition for Writ of Certiorari should be granted for the reasons stated in the Petition, in the Reply of the Petitioner to the Brief in Opposition and as follows:

Introduction.

Since the filing of the Petition for Writ of Certiorari, decisions of the Supreme Court of the United States, of the United States Courts of Appeals for the Fifth and

Seventh Circuits and of the National Labor Relations Board have shown that there is a sharp diversity of opinion between the Court of Appeals for the Ninth Circuit, on the one hand, and the Courts of Appeals for the Fifth and Seventh Circuits, on the other, as to the extent which certain procedures and rules of the National Labor Relations Board may deprive parties before it of due process of law.

The extent of national concern over the failure of the National Labor Relations Board to afford due process of law to parties before it has been strikingly demonstrated since the Order of the Supreme Court denying the Petition for Certiorari herein.

The Petitioner herewith presents an additional substantial ground which is available to it, although not previously presented. Petitioner submits that the Board erroneously reads the National Labor Relations Act, Section 9(a), 29 U. S. C., Section 159(a) as requiring an election of the collective bargaining representative by a majority of those employees voting, rather than by a majority of the employees as the Act specifically states.

These intervening circumstances and additional ground, therefore, are the bases upon which Petitioner urges the Supreme Court to grant the Petition for Rehearing and issue the Writ of Certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The Supreme Court Should Grant the Petition for Rehearing and Should Issue the Writ of Certiorari Because Recent Decisions of the United States Supreme Court, of the United States Courts of Appeal and of the National Labor Relations Board Are Intervening Circumstances of Substantial and Controlling Effect Which Establish the Necessity of the Supreme Court's Deciding the Important Questions of Law Whether the National Labor Relations Board's Procedures Fail to Afford Due Process of Law to Parties Before It in Unfair Labor Practice Hearings.

A. The National Labor Relations Board Should Hear and Consider the Whole Record Before Deciding That an Unfair Labor Practice Has Been Committed.

In an unfair labor practice hearing, Petitioner challenged the appropriateness of the unit for purposes of collective bargaining. Its offer of evidence thereon to afford the Board newly discovered evidence and evidence of a change of circumstances was rejected by the Board. [R. 307-320.]

During the course of the hearing and pending final determination by the Board, a schism occurred within the union. Each of two groups claiming to be the union certified as the exclusive bargaining agent, demanded that The Deutsch Company bargain with it. Petitioner sought to bring this to the attention of the Board and to have the Board take evidence thereon. But its Motion so to do was denied. [R. 86-101; 103-104.]

The Board attempted to carry out one of its most important functions, the election of a representative for pur-

poses of collective bargaining, in an election which was marred by confusion and an inability of the electorate to select under democratic processes their collective bargaining representative. [R. 248-249.]

In order to determine whether Petitioner improperly refused to bargain the Board must find that it failed and refused so to do with a duly elected exclusive bargaining agent for the Petitioner's employees in a unit appropriate for the purposes of collective bargaining. Therefore, the determination of the appropriateness of the unit, the validity of the election which purported to select the bargaining agent and which organization was the bargaining agent is necessary in deciding whether or not there was a failure to bargain.

The Board and the Court of Appeals for the Ninth Circuit held that there was no failure to afford the Petitioner due process of law in refusing to consider the evidence on these vital issues.

But the United States Court of Appeals for the Seventh Circuit in *United Insurance Co. v. National Labor Relations Board*, 272 F. 2d 446 (C. A. 7, 1959), remanded that cause for a full hearing and decision based upon a consideration of all the relevant evidence because the order of the Board purported to determine whether or not certain persons were employees by adopting the findings in a previous proceeding involving the same parties. In *United Insurance Company* and in *Connecticut Light & Power Co. v. Leedom*, 174 Fed. Supp. 171 (D. D. C., 1959), cited therein, the Courts have indicated that a prior Board determination is not binding in future representation proceedings or in a future unfair labor practice proceeding. *A fortiori*, where there has never been a

Board determination, the Board should take evidence on the material issues before making a finding.

See Administrative Procedure Act, Section 7(c), 5 U. S. C., 1006 (c); Labor Management Relations Act, Section 10(c), 29 U. S. C., 160(c).

This Honorable Court has recently again indicated that the resolution of the facts must proceed a determination whether to enforce a decree. *National Labor Relations Board v. Deena Artware, Inc.*, No. 46, October Term, 1949, 28 Law Week 4135 (Feb. 23, 1960). This determination was sought on the question of determining whether or not the Respondent employer was in contempt of an order enforcing a National Labor Relations Board order. It is important that the Board have a full hearing in the Court of Appeals. It is just as important that an employer obtain a full hearing before the Board.

Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Whittaker dissenting in *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, No. 15, October Term, 1959, 28 Law Week 4111 (Feb. 23, 1960), were of the opinion that the decision of the Court of Appeals should have been remanded to the National Labor Relations Board for further proceedings in order to determine whether or not the Union had by its nuisance tactics committed an unfair labor practice. They believed that it was necessary for the Board to have further opportunity to consider pertinent evidence, if any there be, of the Union's lack of good faith in bargaining. Thus this Honorable Court, is now aware of the fact that the loose procedures of the National Labor Relations Board have resulted in error of sufficient gravity to involve a deprivation of due process of law in cases pending while this matter was under consideration.

B. The National Labor Relations Board Deprived Petitioner and Its Employees of Due Process of Law by Refusing to Consider Whether Its Procedural Errors Caused Confusion in an Election in Which Only a Minority of the Employees Voted and Thus Caused a Substantial Defect in the Election Machinery to Select a Collective Bargaining Representative.

At the time of the proposed Board election, here, the Petitioner had been attempting to obtain from the Board a consideration of additional relevant facts going to the question of the appropriateness of the unit for collective bargaining. [Resp. Ex. 6; R. 320, 424-446.] The Board, however, persisted in holding its election while this matter was pending before it. [R. 326-330.] As a result there was no employees list in the hands of the persons conducting the election and less than 40% of the number of employees eligible to vote cast their ballots at that election. [R. 247-249; Gen. Coun. Ex. 7; R. 350.] The Board did not, until after the election, formally notify the Petitioner of the fact that it rejected the objections to the Representation Hearings. [Resp. Exs. 8 and 9; R. 251-254, 333, 449-451.]

The confusion which marked this election is obvious. The employer believed that the matter was still under consideration by the Board. The employees were so notified. The persons conducting the Board's election did not even know whether or not those who purported to be employees and voted were actual employees. Only 40% of the number of employees voted at this election.

The National Labor Relations Board has held an election invalid where confusion in the election was attributable either to any conduct of the employer or any defect in the election procedure or any unusual circumstance. It has been the Board's opinion that such an elec-

tion should be set aside and another elections directed. *Wagner Electric Corp.*, 125 N. L. R. B., No. 106 (Dec. 17, 1959.)

This very recent case illustrates the proper rules which should have been applied in the case at bar. The confusion here resulted from a defect in the election procedure in holding the election without giving notice of the Board's action on the pending Petition for Rehearing on the Representation Proceeding. The conduct of the Board and its error caused this situation. The resulting confused election should not be validated by refusing to consider its validity at the hearing on the charge of refusing to bargain.

C. Since the National Labor Relations Board Must Determine Whether or Not the Unit for Purposes of Collective Bargaining Is Appropriate Before It Can Decide That an Unfair Labor Practice of Refusing to Bargain Has Been Committed, the Board Deprived the Petitioner of Due Process in Finding an Unfair Labor Practice for Refusing to Bargain in an Inappropriate Unit.

The determination of the Board as to the appropriateness of the unit must admittedly be on a case by case basis and, to a great extent, must be left to the presumed expertise of the Board in this special field. But the Board must act in accord with recognizable standards. Within very recent weeks the Board has found that single plant units were appropriate where the operations were not functionally integrated, where there was no employee interchange between the plants of the employer and where the operations of the plants were not administratively integrated below the top level of management: *Telecomputing Corp.*, 125 N. L. R. B. No. 3 (Nov. 4, 1959); *Kennecott Copper Corp.*, 125 N. L. R. B. No. 12 (Nov. 12, 1959).

On the same facts the Board found the single-plant unit inappropriate here. A complete review of the evidence with regard to the appropriateness of the unit will not be reiterated here. Detailed references to the record are contained in the Petition for Writ of Certiorari at pages 4 through 6. The fact that the Board found that the single plant unit might have been an appropriate one, but directed an election in a multi-plant unit offered little consolation to Petitioner or to its employees where under these circumstances the finding of the Board in this case was based upon incomplete evidence and resulted in the administrative error followed throughout these proceedings.

D. The Failure of the Board to Take Evidence as to the Proper Organization Qualifying as the Representative for the Purposes of Collective Bargaining Is a Failure to Receive Proper Testimony on One of the Relevant Elements on the Charge of Unfair Labor Practice for Refusal to Bargain.

The recent decision of the United States Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Dan River Mills, Inc.*, ... F. 2d ..... 45 L. R. R. M. 2539 (C. A. 5, Jan. 26, 1960), demonstrates that the employer is not improperly refusing to bargain where it in good faith doubts the union's majority. Petitioner sought to introduce evidence of the fact that each of two organizations claimed to be the bargaining agent. [R. 80-101.] The Board refused to receive this evidence. [R. 103-104.] Both of these organizations could not be the certified bargaining representative. This Honorable Court recently denied Certiorari where the Court of Appeals for the Seventh Circuit held that the service of process on a local union was not

valid service on the parent international union. *Morgan Drive Away Inc. v. Teamsters*, No. 413, October Term, 1959, 45 L. R. R. M. 2131 (1959). Therefore until there can be a determination of which of the organizations is the certified bargaining representative, there has been no proper demand for bargaining and therefore no improper refusal to bargain under the provisions of the Labor-Management Relations Act, Section 8(a)(5).

2. Where the Statute Requires That the Representative for Purposes of Collective Bargaining Be Selected by a Majority of the Employees and Where Admittedly the Election Conducted by the Board Did Not Result in a Selection of the Representative by a Majority of the Employees, the Purported Representative Was Not Legally Selected Thereby and Is Not a Representative for Purposes of Collective Bargaining With Which the Employer Is Required to Bargain.

It is uncontradicted that at the election conducted by the Board only 40% of the employees of Petitioner voted. [Gen. Coun. Ex. 7, R. 350.] Thus, only a minority of the employees voted for the union. That number supporting the union in the election was not a majority of the employees within the meaning of the National Labor Relations Act, Section 9, 29 U. S. C., Section 159. The Court of Appeals for the Ninth Circuit in the case at bar indicated that it did not make any difference whether or not a majority of the employees voted for the union at the election. Based on the authority of the Railway Labor Act, 45 U. S. C., Section 151 *et seq.*, the Court of Appeals for the Ninth Circuit held that the election was valid where the majority of those *who voted* cast their ballots for the union.

This is, however, a determination contrary to the clear provisions of the National Labor Relations Act. The Act does not state that the representative be designated or selected by a majority of the employees *who vote* at the election. If that had been the intent of Congress that is what Congress would have declared in the Act. The Board now seeks to write an additional clause into the statute. This Honorable Court has within recent weeks prevented the Board from Exceeding the power given it under the Act. *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, No. 15, October Term, 1959, 28 Law Week 4111 (1960).

The opinion of the Court of Appeals for the Ninth Circuit in the case at bar specifically states that there is no decision of the Supreme Court holding that a majority of the votes cast in an election is sufficient for the choice of the bargaining representative under the National Labor Relations Act, even though it is the holding of the Board and of various Courts of Appeal which have had occasion to pass upon the question. It is respectfully submitted that this important question should be considered by the Supreme Court of the United States because of the repeated error of the various Courts of Appeals. This issue has not heretofore been considered by this Honorable Court, but, it is respectfully submitted, that it alone affords sufficient reason for the granting of this Petition for Rehearing and the issuance of Certiorari herein.

3. The Legal Issues Posed by the Deprivation of Due Process Practiced by the National Labor Relations Board Upon the Petitioner Here Has National Significance as Evidenced by the Increasing Number of Cases in the Courts of Appeal and the United States Supreme Court in Which Similar Issues Were Raised and by the Concern of the Bar With the Failure of the National Labor Relations Board to Adopt and Employ Fair Rules and Procedures.

Petitioner is not alone in complaining of the failure of the National Labor Relations Board to afford due process of law in a matter under consideration by it. The United States Courts of Appeal have, within recent weeks, become more and more aware of the Board's departure from rules and procedures affording a fair hearing to the parties before it.

United Insurance Co. v. National Labor Relations Board, 272 F. 2d 446 (C. A. 7, 1959);

National Labor Relations Board v. Dan River Mills Inc., ... F. 2d ..... 45 L. R. R. M. 2529 (C. A. 5, 1960).

The Labor Relations Law Section of the American Bar Association attempted to examine with the National Labor Relations Board the practices and procedures of the Board with a view to rectifying the errors which have become increasingly apparent on a very widespread scale. Because the Board rejected the recommendations, it has been made clear that no effective relief can be secured through agency action and consequently the Bar is now recommending that the matter be studied by a Congressional Committee (45 Labor Relations Report 407, Feb. 29, 1960). The errors here, however, should properly be corrected by this Honorable Court.

It is apparent, therefore, that this Honorable Court is not being presented here with an isolated situation in which the Board and the United States Court of Appeals for the Ninth Circuit, having reviewed the record, are satisfied that no substantial error exists.

This Honorable Court is being asked to give its full consideration to a case which is a striking example of the cavalier manner in which the National Labor Relations Board purports to resolve issues presented to it. When administrative error is made, the Board is inclined to force the result through to a predetermined conclusion and, thus, compound the error. It acts arbitrarily without considering an established pattern of its own decisions upon which parties may rely and makes its decisions without a full consideration of the record before it. It has established rules for the conduct of elections which alter, without right, the language of the relevant legislation and change the effect and purpose of the legislation. In view of these circumstances and the importance of stable labor-management relations under present economic conditions in this county, this Honorable Court should take this opportunity to review the National Labor Relations Board's improper and illegal exercise of authority.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Rehearing should be granted and a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEON M. COOPER,

Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am the counsel for the Petitioner in this cause, that I make this Certificate in compliance with Rule 58 of the Rules of this Court, that the Petition is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58, subsection 2, of the Rules of this Court.

LEON M. COOPER,
Counsel for Petitioner.